In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility

ROBERT J. JOHNSON*

I. INTRODUCTION

The Model Code of Professional Responsibility, consisting of Canons, Ethical Considerations, and Disciplinary Rules,[1] has been adopted, with some variations, by several jurisdictions in the United States.[2] The Code sets forth

---

* This Comment received the 1996 Donald S. Teller Memorial Award as the second year writing that contributed most significantly to the *Ohio State Law Journal*. The author would like to thank his wife, Julie Johnson, and his family for their support and encouragement.

[1] The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived. *See* Thomas S. Brown & M. Jane Goode, *Conflicts of Interest in Subrogation Actions*, 22 TORT & INS. L.J. 16, 17 n.2 (1986) (citing preliminary statement to MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980)).

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which a lawyer can rely for guidance in many specific situations. *See id.*

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *See id.*

[2] *See id.* Ohio adopted the Model Code of Professional Responsibility on October 5, 1970. *See* OHIO CLE INST., REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM CPR 1 (1990). The Model Code of Professional Responsibility was originally adopted in 1969. *See ABA Model Code of Professional Responsibility*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:301 (Oct. 9, 1991).

The Model Code was amended several times, with the last set of amendments adopted in 1980. *See id.* In August 1983, the ABA drafted the Model Rules of Professional Conduct. *See id.* Although several states still follow the Model Code, the majority of states now base their ethics rules on the Model Rules of Professional Conduct. *See id.* A partial listing of the states which have revised their ethics rules in accordance with the Model Rules of Professional Conduct appears in the ABA/BNA Lawyers' Manual on Professional Conduct. *See State Ethics Rules*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:11 (Jan. 21, 1987).

This Comment will focus on the Model Code of Professional Responsibility as it has been adopted in Ohio. The crux of the Note's analysis is centered on two Ohio ethics

the various duties and responsibilities that each practicing attorney must follow, and subjects attorneys who violate its rules to potential discipline.[3] Consequently, the Code stands as the ethical cornerstone of the legal profession and exists to provide guidance to attorneys on their professional responsibilities.[4]

One issue that the Code specifically addresses is an attorney's multiple

---

opinions and therefore, emphasis has been placed on the Model Code. The text of the Model Code, however, is very similar to the text of the Model Rules of Professional Conduct as it pertains to the conflict of interest issues specifically addressed in this Comment. *See* RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW (1995) (discussing Rule 1.7 of the Model Rules of Professional Conduct, which is the general rule that addresses conflict of interest situations, and comparing it to DR 5-101 and DR 5-105, which are the Model Code counterparts to Rule 1.7). An in-depth comparison of the similarities and differences between the Model Code and the Model Rules can be found in the ABA/BNA Lawyers' Manual on Professional Conduct. *See generally ABA Model Rules of Professional Conduct*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:101–1:182 (Feb. 21, 1996); *see also* ZITRIN & LANGFORD, *supra*.

It is also important to note that the American Law Institute (ALI) has proposed the *Restatement of the Law Governing Lawyers*. *See ALI Approves Almost Half of Restatement on Lawyers*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:170 (May 29, 1996). The proposed *Restatement* sets out, for the guidance of the legal profession and courts, the law on lawyers' obligations and rights in eight categories including regulation of the lawyer-client relationship and regulation of conflicts of interest. *See id.* at 1:171.

Unlike state ethics rules, which are designed to serve as disciplinary codes setting forth statements of standards of civil litigation, the *Restatement* (while overlapping many of the topics found in ethics codes) is intended by the ALI to state the law applicable to resolution of such civil proceedings as legal malpractice actions, qualification motions, and fee disputes. *See id.* The nearly decade-long project is scheduled for completion in May 1997, but there was speculation at this year's meeting that approval of the *Restatement* may not actually reach its conclusion until 1998. *See id.*

[3] Some of the disciplinary actions that may be taken against an attorney who violates the Code are: (a) suspension of license to practice law, (b) removal of license to practice law (disbarment), and (c) the imposition of penalties in the form of monetary fines. *See* L.C. Di Stasi, Jr., Annotation, *What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action*, 17 A.L.R.3d 835 (1995); *see also* Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CIN. L. REV. 947 (1994) (providing a good analysis of a typical disciplinary action against an attorney and the procedural process involved from start to finish).

[4] This statement is supported by the fact that a majority of the states have adopted some form of either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. *See ABA Model Code of Professional Responsibility*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:301 (Oct. 9, 1991); Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:11–1:46 (Jan. 21, 1987).

representation of adverse or partially adverse parties.[5] An attorney may be asked to represent two clients who have conflicting or potentially conflicting interests. Certain situations where these conflicts commonly occur are specified in Ethical Consideration 5-17 which states, "Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his (her) insurer,[6] and beneficiaries of the estate of a decedent."[7]

As stated by EC 5-17, one area which abounds with conflict of interest problems and disputes is insurance defense work. An attorney employed by an insurer to represent an insured may be confronted with serious conflicts of interest almost from the very beginning of the relationship.[8] These conflicts

---

[5] *See* Brown & Goode, *supra* note 1, at 16.

[6] An attorney's representation of the insured and his insurer may not always be a two client situation. For example, the situation may be viewed instead as the attorney representing a single client, the insured, with the insurer paying the attorney's fees. DR 5-107 and EC 5-22 address this issue. DR 5-107(A) states that a lawyer may not accept compensation for his legal services from one other than his client except with the consent of his client after full disclosure. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(A) (1980). DR 5-107(B) states that the person making payments (the insurer) shall not direct or regulate the attorney's judgment in representing his client (the insured). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1980). EC 5-22 warns against having a third party (the insurer) pay for services because it may conflict with the attorney's responsibility to his client (the insured). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-22 (1980).

Although this alternative situation may arise, it appears that the representation of the insured by the insurer's in-house counsel (the subject of this Comment) is more of a two client situation due to the fact that the in-house attorney is already an employee of the insurer. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES, 827–28 (1988); *see also infra* note 12 for a further explanation of the in-house counsel versus outside counsel distinction.

[7] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1980).

[8] *See* KEETON & WIDISS, *supra* note 6, at 829–30. Some examples of conflicts of interest include: (1) the possibility that the third party's claims against an insured are not covered by the applicable liability insurance (*e.g.*, the insured may have committed an intentional tort which is not covered under the insurance policy, and thus, it is in the insurer's best interest to prove that an intentional tort was committed; it is in the insured's best interest, however, to prove that only an act of negligence occurred which would still be covered under the insurance policy); (2) claims in excess of the applicable limits of the liability coverage (*e.g.*, when the amounts sought by several claimants exceed the available insurance coverage, the interests of the insured and the insurer may differ with respect to

may be particularly problematic in insurance defense representation because of the conflicting economic and professional allegiances.[9] Usually the conflict faced by the lawyer is that of accommodating the interests of the insurance company in reducing its costs by limiting the scope of its coverage obligations while promoting the interests of the insured to receive the maximum benefits recoverable under the insurance policy.[10] With these inherent conflict of interest problems constantly confronting insurance defense attorneys, at least one author has been inspired to refer to insurance defense work as "an impossible task"[11] for lawyers.

Representative of the difficulties faced by insurance defense attorneys in handling conflict of interest problems is a dilemma which tests the boundaries of the Model Code of Professional Responsibility. This dilemma involves the proper scope of representation by an in-house counsel[12] employed by an

---

the allocation of the available insurance coverage to various claimants); (3) misrepresentation by an insured as to the claim (*e.g.*, insurer may decide that the insured has not been telling the truth about the events that are relevant to a third party's claim against the insured). *See id.* at 812–21.

Some situations, however, are such that it should be possible for the attorney to represent both the insured and the insurer after giving complete disclosure and obtaining the fully informed consent of both the insured and the insurer. *See id.* at 833–34. Relatively minor conflicts of interest which may allow for joint representation of the insured and the insurer by an attorney include subrogation claims and claims involving collection of the deductible. *See id.* at 219–21, 834.

[9] *See* JACK A. GUTTENBERG & LLOYD B. SNYDER, THE LAW OF PROFESSIONAL RESPONSIBILITY IN OHIO 108 (1992). The text provides an excellent summary of how such a conflict may arise:

> An insurance defense attorney's long-term client is the insurance company. A long-term relationship depends on the lawyer performing to the expectations of the insurance company. The lawyer may feel compelled to offer the insurance company information obtained from the insured that will limit the company's liability or to couch settlement recommendations in a manner that protects the company from a future bad faith claim. Conversely, the lawyer has a professional obligation to the insured. She may try to keep information from the insurer or to color settlement recommendations in favor of the insured. In either event, the lawyer is trying to serve two masters with potentially conflicting interests.

Id.

[10] *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 428 (1986).

[11] John F. Larkin et al., *Misery, Malpractice, and Mail Fraud: Lawyers' Professional Liability in the 90s*, C641 ALI-ABA 295, 297 (1991) (quoting Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1171 (1954)).

[12] For clarification, an insurance company's salaried attorneys are often referred to as

insurance company. The issue is whether the in-house counsel should represent both the insured and the insurer. It is a relatively recent ethical issue which has divided authorities across the nation[13] and which has raised more questions than it has answered. Further, it is an issue which has left lawyers with little guidance on how to approach the ethical problems that surround it.

Ohio is one state that has found this dilemma to be particularly perplexing. In a little more than a year's time, The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline[14] has considered, on two separate

---

"in-house counsel." Attorneys in a private practice retained by insurance companies to represent insureds are commonly referred to as "outside counsel." *See* The Supreme Court of Ohio Board of Comm'rs on Grievances and Discipline, Op. 95-14, at 2 (1995) [hereinafter Ohio Discipline Op. 95-14]. Many insurance companies have started employing in-house counsel as opposed to seeking outside counsel due to the sheer volume of litigation that insurance companies are involved in and the advantages of having these attorneys present for legal advice on a full-time basis.

Several distinctions can be made between in-house counsel representation and outside counsel representation. When an insurer decides to have in-house counsel appear on behalf of an insured in defense of a tort claim covered by the insurance policy, conflicts of interest are certainly no less intense, and may even be greater than those that exist when an insurer selects an outside counsel to defend the claim. *See* KEETON & WIDISS, *supra* note 6, at 827. Obviously, counsel who is a salaried employee of an insurance company has added relationships which enhance the prospects of a subjective bias in favor of the insurer because the in-house counsel is financially dependent on one client, the insurer. *See id.* at 827 n.19 (citing Ronald E. Mallen, *A New Definition of Insurance Defense Counsel*, 1986 DEFENSE COUNS. J. 108–23). Such considerations as advancement in salary and advancement in position influence in-house counsel in their decisionmaking. *See id.* Consequently, control ultimately lies with the insurer (employer) because the in-house counsel wants to satisfy the insurer (client). *See id.* This situation creates a risk for conflict when the insurer's interests diverge from the interests of the insured. *See id.*

Although these inherent conflicts of interest confront in-house counsel, strong reasons exist for an insurer to select in-house counsel as opposed to outside counsel to represent the insured. *See id.* at 827. For example, the insurer may desire to select in-house counsel based on the belief that these attorneys are in a better position to develop substantial expertise in insurance defense through the repeated handling of particular types of liability coverage and that this experience could be particularly helpful in the defense of claims that arise under unusual or very specialized types of situations. *See id.*

[13] *Compare In re* Youngblood, 895 S.W.2d 322, 329–30 (Tenn. 1995) (holding that in-house counsel for the insurance company *may* represent individual insureds in legal matters arising under the company's policy) *with* Gardner v. North Carolina State Bar, 341 S.E.2d 517, 523 (N.C. 1986) (holding that in-house counsel for the insurance company *may not* represent the insured in an action brought by a third party for a claim covered by the terms of the insurance policy).

[14] Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions

occasions, the proper scope of representation for an in-house counsel employed by an insurance company.[15] On the first occasion, the Board stated that an in-house counsel employed by the insurance company may not represent the insured.[16] On the second occasion, the Board reversed its position on the issue and stated that an in-house counsel employed by the insurance company may represent the insured.[17] With these conflicting opinions, it is obvious that the Board has had a difficult time in dealing with the ethical and legal questions that this issue raises. Due to this difficulty, an Ohio attorney is still left with only questionable guidance on her professional responsibilities in the area of insurance defense.

Given the inconsistent opinions in Ohio over this issue, combined with the overall division across the nation, it should be considered whether the Model Code of Professional Responsibility adequately addresses the ethical issues raised in the context of insurance defense representation. This Note will answer this question through the following three-part analysis. First, it will examine the specific provisions in the Code pertaining to the conflict of interest issues arising in insurance defense work, as well as the duties and responsibilities the Code creates for a practicing attorney. Second, it will analyze the Ohio Board's opinions regarding the scope of representation for an in-house counsel employed by an insurance company in order to (a) decide which opinion makes the proper interpretation of the Code, (b) discuss decisions in other states concerning this issue, and (c) set out the possible implications of these decisions on the Code. Third, since the Code has not dealt specifically with the proper scope of representation for an in-house counsel employed by an insurance company, this Note will propose a model provision which should be added to the Code to help provide some clearer guidelines to attorneys on their ethical responsibilities in dealing with this issue.

---

regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. *See generally* OHIO SUP. CT. GOV. BAR R. V § 2(C).

[15] *See* The Supreme Court of Ohio Board of Comm'rs on Grievances and Discipline, Op. 94-9 (issued on August 12, 1994) [hereinafter Ohio Discipline Op. 94-9]; Ohio Discipline Op. 95-14 (issued on December 1, 1995). These two opinions were issued only sixteen months apart.

[16] *See* Ohio Discipline Op. 94-9, at 5. Specifically, the in-house counsel was barred from attempting to collect deductibles from tortfeasors on behalf of an insured party. *See id.*

[17] *See* Ohio Discipline Op. 95-14, at 6. Specifically, the in-house counsel was permitted to attempt to collect deductibles from tortfeasors on behalf of a consenting insured party. *See id.*

II. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Four provisions found within the Model Code of Professional Responsibility raise conflict of interest issues relevant to insurance defense representation. These provisions are EC 5-17 and Canon 9, which deal generally with conflict of interest issues, and DR 5-101 and DR 5-105, which deal more specifically with these issues.[18] As discussed previously, EC 5-17 highlights the fact that insurance defense work is a situation where conflicts of interest are prone to occur.[19] Because these conflicts are inherent in insurance defense representation, an attorney must carefully analyze each case to determine the extent to which the lawyer's professional judgment will be affected by any differing interests.[20] EC 5-17 provides little more than general guidance, but it does make it reasonably clear that if the lawyer's allegiance is slanted in any direction, it must be slanted in favor of the insured, and not the insurer.[21]

Another provision that only provides general guidance on this issue is Canon 9, which states that "[a] Lawyer Should Avoid Even the Appearance of

---

[18] Rule 1.7 of the Model Rules of Professional Conduct is the Model Rule's counterpart to these Model Code provisions. *See* ZITRIN & LANGFORD, *supra* note 2, at 128.

[19] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1980). While EC 5-17 provides a specific listing of situations where conflicts of interest may occur, Canon 5 and EC 5-14 of the Code state the reasoning why such a conflict poses a problem. *See* GUTTENBERG & SNYDER, *supra* note 9, at 109 n.80. Canon 5 states, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980). This rule is made more specific by EC 5-14, which states:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1980).

[20] *See* WOLFRAM, *supra* note 10, at 429; *see also supra* note 8 and accompanying text.

[21] *See* WOLFRAM, *supra* note 10, at 429 (referring to footnote 23 of EC 5-17); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1980). The American Law Institute debated this point at their most recent meeting in May 1996 with no clear resolution. *See ALI Approves Almost Half of Restatement on Lawyers*, Lawyers' Man. on Prof. Conduct (ABA/BNA) 1:171 (May 29, 1996).

Professional Impropriety."[22] Canon 9 exists to prohibit conduct that casts doubt upon the integrity of the attorney-client relationship.[23] The avowed purpose of this directive is to promote public confidence in our legal system and in the legal profession.[24]

The more specific provisions of the Code which deal directly with conflict of interest situations are DR 5-101 (specifically paragraph A) and DR 5-105.[25]

---

[22] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980). This provision is usually referred to as the appearance of impropriety rule. *See* Ohio Discipline Op. 95-14, at 3.

[23] *See* Ohio Discipline Op. 95-14, at 3.

[24] *See* Brown & Goode, *supra* note 1, at 19 (referring to the Model Code of Professional Responsibility, EC 9-1 and 9-2).

[25] Specifically, DR 5-101 states:

> **DR 5-101** REFUSING EMPLOYMENT WHEN THE INTERESTS OF THE LAWYER MAY IMPAIR HIS INDEPENDENT PROFESSIONAL JUDGMENT
>
> **(A)** Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1980). Specifically, DR 5-105 states:

> **DR 5-105** REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER
>
> **(A)** A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to extent permitted under DR 5-105(C).
>
> **(B)** A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to extent permitted under DR 5-105(C).
>
> **(C)** In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> **(D)** If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate, or any other lawyer affiliated

The most often implicated Disciplinary Rule concerning conflicts of interest, DR 5-105, sets forth the circumstances under which an attorney must decline or discontinue multiple employment.[26] An attorney "must decline or discontinue multiple employment if the exercise of his or her professional judgment is likely to be adversely affected by such employment, or if such employment would be likely to involve him or her in representing differing interests."[27] An exception to this rule allows the attorney to maintain joint representation if it is obvious that the attorney can adequately represent the interests of each client and the clients consent to the multiple representation after full disclosure.[28] Overall, these conflict of interest rules exist to promote and protect the duty of loyalty which must be present in each attorney-client relationship.[29]

III. LAWYERS' DUTIES, RESPONSIBILITIES, AND LIABILITIES UNDER THE CODE

A. *Duties and Responsibilities*

The provisions of the Model Code of Professional Responsibility discussed in Part II anticipate conflict of interest problems for attorneys in insurance defense work. The existence of such conflicts entail significant problems and risks for attorneys.[30] The duties and responsibilities of the attorney when confronted with such a conflict are dictated by the Model Code of Professional Responsibility, and relate to the attorney's relationship with both the insured and the insurer.[31]

As the Code states, the attorney must endeavor both to anticipate and to recognize actual conflicts of interest.[32] This means that an attorney needs to use professional expertise, as well as considerable care, in deciding whether a possible conflict may exist.[33] Once an attorney becomes aware that a conflict or a potential conflict of interest exists, the attorney must inform the insured and

---

with him or his firm, may accept or continue such employment.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

[26] *See* Brown & Goode, *supra* note 1, at 17.

[27] *Id.* The author is referring to DR 5-105.

[28] *See id.* at 18. The author is referring specifically to DR 5-105(C).

[29] *See* Ohio Discipline Op. 95-14, at 3.

[30] *See* KEETON & WIDISS, *supra* note 6, at 830.

[31] *See id.*

[32] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1980).

[33] *See* KEETON & WIDISS, *supra* note 6, at 830.

the insurer of all the facts and circumstances relating to the conflict.[34] This information is provided so that the parties have the opportunity to seek independent counsel,[35] an option that the attorney must explain to the parties.[36]

At this point, after the insured and insurer have been informed of the conflicts, the attorney may still seek joint representation[37] of the parties.[38] This

---

[34] *See id.* at 831–32; *see also* Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 715 (1984) (stating that an attorney has a duty "to 'protect his client in every possible way,' and it is a violation of that duty for the attorney to 'assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.'"); Yeomans v. All State Ins. Co., 296 A.2d 96, 99 (N.J. Super. Ct. 1972) (citing Ging v. American Liberty Ins. Co., 423 F.2d 115, 120–21 (5th Cir. 1970)), *aff'd* 324 A.2d 906 (N.J. Super. Ct. 1974); Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (stating that "[i]f a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict.").

> There is "a duty of fair and full disclosure between insured and his insurer," and where, as here, the insurer undertook to represent its insured, its duties included apprising the client of settlement opportunities within a reasonable time after they were presented; it entailed the duty to warn the client of difficulties which the litigation posed for him wherever such difficulties were not included within the contract of indemnity; it included the duty to advise the client of the outcome of the litigation and of any particular procedures which might lessen its financial impact upon him; and it included the conduct of settlement negotiations in good faith to the interests of the insured wherever those interests might be divergent from the interests of the insurance company.

Yeomans, 296 A.2d at 99.

[35] *See* KEETON & WIDISS, *supra* note 6, at 831.

[36] *See* GUTTENBERG & SNYDER, *supra* note 9, at 111.

[37] The attorney must be careful here in pursuing joint representation. DR 5-105(C) states the requirement that it must be "obvious" that an attorney can represent both interests. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980). Courts have stated that "obvious" must be assessed in reference to an objective standard under which the ability of the attorney to represent adequately the interests of each client is "free from substantial doubt." Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1348 n.12 (9th Cir. 1981); City Consumer Servs., Inc. v. Horne, 571 F. Supp. 965, 971 (C.D. Utah 1983) (stating that the "obvious" standard must be assessed in relation to whether the lawyer possesses substantial doubt that each client can be adequately represented).

[38] *See* GUTTENBERG & SNYDER, *supra* note 9, at 111. The insured, however, is generally not informed of the potential conflicts that may arise from joint representation of both the insured and the insurer by an attorney because the insured often consents to the conflicting representation in advance through the insurance contract. *See id.* This advanced

reality means that certain situations[39] still exist where the conflicting interests are such that it would be possible for an attorney to represent the insured after making a complete disclosure, and obtaining the fully informed written consent of the insured and the insurer.[40] Although these situations for dual representation may arise, the attorney should advise the parties with conflicting interests that some courses of action that might otherwise be available to the parties and the attorney might be precluded by the joint representation.[41]

If the attorney decides to undertake joint representation of both the insured and the insurer, the attorney must balance the respective interests of the parties

---

consent raises some definite concerns with the insurance contract and the rights that the insured may forfeit when signing his or her particular insurance policy.

Insurance contracts are prime examples of adhesion contracts. *See* William Mark Lashner, Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175, 1177 (1982). Adhesion contracts are standard form contracts, offered on a take-it-or-leave-it basis by one party (*e.g.*, the insurer) to a second party with much less bargaining power (*e.g.*, the insured). *See id.* at 1178. These contracts are not negotiated agreements. *See id.* at 1179. The offeree lacks power to bargain for the terms of the agreement and is often unable to find significantly different terms with another offeror. *See id.* In no other type of adhesion contracts are the dangers to consumers, due to the contracts' adhesive nature, potentially so damaging than in the insurance contract. *See id.* at 1177. Provisions, such as consenting to dual representation by an attorney of both the insured and the insurer, and exclusions often are supplied unilaterally by insurers and are unknown to the insureds. *See id.* Consequently, the insured may be unknowingly giving up her right to seek separate representation by a different attorney because she was not properly informed by the insurer, at the time the insurance contract was signed, of the potential conflicts that may arise when an insurance company's attorney jointly represents both the insurer and the insured.

[39] Many situations exist where dual representation is inappropriate; at times, the conflicts of interest are so great that the attorney can not possibly represent the interests of each client adequately (*e.g.*, representing both the husband and the wife in a heated custody battle for their children as part of a divorce proceeding). Therefore,

> [T]he attorney who undertakes to represent parties with divergent interests owes the "highest duty" to each to make a "full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."

Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 716 (1984) (quoting Klemm v. Superior Court, 75 Cal. App. 3d 893, 901 (1977); American Mut. Liab. Ins. Co., 38 Cal. App. 3d 579, 590 (1974); Lysick v. Walcom, 258 Cal. App. 2d 136, 147–49 (1968)).

[40] *See* KEETON & WIDISS, *supra* note 6, at 833; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980).

[41] *See* KEETON & WIDISS, *supra* note 6, at 833.

while making sure that his duty to one party does not hinder the interests of the other party.[42] Several courts have held that the attorney's duty to the insured takes precedent over the attorney's duty to the insurer.[43] On the other hand, if the attorney decides that the conflict is so significant that it precludes representation of both the insured and the insurer, the attorney should withdraw from the representation of the insured.[44]

B. *Lawyer's Liabilities Under the Code*

The attorney occupies a fiduciary relationship to the insured, as well as to the insurance company.[45] As a result of this special relationship, an attorney may be subject to liability for harm resulting from conduct in relation to conflicts of interest between the insured and the insurer.[46] This principle is evidenced in the attorney's relationship to the insured, where the attorney's liability to the insured for malpractice in relation to conflict of interest problems is well established.[47]

An attorney also may be liable to the insurer for malpractice claims.[48] The Supreme Court of Michigan provided an interesting rationale for this liability in

---

[42] *See id.* at 833–34 (citing United States Fidelity & Guaranty Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978) and Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 715–16 (1984)).

[43] *See* KEETON & WIDISS, *supra* note 6, at 834 (citing Norman v. Insurance Co. of N. Am., 239 S.E.2d 902, 907 (Va. 1978) (stating that the legal profession's standards "require undeviating fidelity of a lawyer to his client, and . . . an insurer's attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.")); *see also* American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579 (1974); Crum v. Anchor Cas. Co., 119 N.W.2d 703, 712 (Minn. 1963); Trieber v. Hopson, 277 N.Y.S.2d 241 (1967).

[44] *See* KEETON & WIDISS, *supra* note 6, at 835. Even if the attorney does not voluntarily withdraw, the attorney still may be disqualified from appearing in the case by the court if the attorney is representing two clients simultaneously and their interests are adverse. *See* W.R. Habeeb, Annotation, *Representation of Conflicting Interests as Disqualifying Attorney from Acting in a Civil Case*, 31 A.L.R.3d 715 (1995); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1980).

[45] *See, e.g.*, Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 75 (1984); Houston Gen. Ins. Co. v. Superior Court, 108 Cal. App. 3d 958, 964 (1980); Zalta v. Billips, 81 Cal. App. 3d 183, 187–88 (1978).

[46] *See* KEETON & WIDISS, *supra* note 6, at 835.

[47] *See id.* (citing Lieberman v. Employers Ins., 419 A.2d 417 (N.J. Ct. App. 1980)); *see also* Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 715–16 (1984).

[48] *See* KEETON & WIDISS, *supra* note 6, at 837–38.

the case of *Atlanta International Insurance Co. v. Bell*.[49] At issue in the case was whether a defense counsel retained by an insurance company to defend its insured could be held liable to the insurer for professional malpractice.[50] Although the court stated that the relationship between the insurer and the attorney did not rise to the level of a traditional attorney-client relationship,[51] the court held that the attorney could be liable to the insurer for professional malpractice.[52] This holding seemed to conflict with the traditional legal doctrine, which mandated that only a person in the special privity of the attorney-client relationship could sue an attorney for malpractice.[53] However, the court used the doctrine of equitable subrogation, which permits one party to stand in the place of the other, to remedy that conflict.[54] In other words, the court placed the insurer in the place of the insured, who does possess the appropriate attorney-client relationship with the attorney, thus giving the insurer the required privity to bring a suit for malpractice against the attorney.[55] Consequently, an attorney handling insurance defense work could be held liable to both the insured and the insurer for malpractice if she does not

---

[49] 475 N.W.2d 294 (Mich. 1991).

[50] *See id.* at 295.

[51] *See id.* at 297.

[52] *See id.* at 297–99.

[53] *See id.* at 296. The traditional legal doctrine in this area states that only an individual who has the special privity of the attorney-client relationship can sue an attorney for malpractice. *See Id.* Because the court held the attorney was liable to the insurer for professional malpractice, even though the insurer did not have the requisite privity relationship with the attorney, the holding appears to conflict with the traditional legal doctrine.

[54] *See id.* at 297–99. Equitable subrogation has been described as a "legal fiction" that permits one party to stand in the shoes of the other. *See id.* at 298.

[55] *See id.* at 297-99. The court explained its reasoning for applying this equity principle as follows:

> The doctrine is eminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.

Id.

appropriately interpret her responsibilities in dealing with conflict of interest problems as stated by the Model Code of Professional Responsibility.

IV. IN-HOUSE COUNSEL EMPLOYED BY INSURANCE COMPANIES: A DIFFICULT ISSUE CONFRONTING THE CODE

A. *Recent Ohio Ethical Opinions Regarding the Proper Scope of Representation for In-House Counsel Employed by Insurance Companies*

The proper scope of representation for an in-house counsel employed by an insurance company is an issue which has been addressed by authorities across the nation, but no consensus has been reached on the matter.[56] Ohio is one state in particular which has appeared to have a difficult time in dealing with this problem. In just over a year's time, The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline has rendered two opinions on this issue, providing a different response in each case.[57]

The hypothetical[58] considered by each opinion involved attorneys employed by an insurance company which would function within an "in-house law firm" to pursue subrogation claims for the insurer and to attempt collection of deductibles from a tortfeasor on behalf of the insureds.[59] These duties would be in addition to the attorneys' other duties assigned to them as employees of the insurance company.[60] The question presented could be asked in two parts: (1) whether it was proper for salaried attorneys employed by an insurance company (in-house counsel) to pursue subrogation claims against tortfeasors; and (2) whether it was proper for salaried attorneys employed by an insurance company (in-house counsel) to attempt collection of deductibles from a tortfeasor on behalf of insureds with their consent.[61]

---

[56] *See* Ohio Discipline Op. 95-14, at 5.

[57] The first opinion, Ohio Discipline Op. 94-9, was rendered on August 12, 1994. The second opinion, Ohio Discipline Op. 95-14, which reversed the first opinion, was rendered on December 1, 1995.

[58] In addition to actual cases, hypotheticals may be submitted to the Board by an attorney who has questions regarding certain ethical issues which may arise in the course of his practice. The hypothetical presented here is an example of this type of request for guidance from the Board by an attorney. *See* Ohio Discipline Op. 95-14, at 8.

[59] *See* Ohio Discipline Op. 94-9, at 1.

[60] *See id.* at 2.

[61] *See* Ohio Discipline Op. 95-14, at 1.

1. *Opinion 94-9*

The first opinion rendered by the Board of Commissioners on Grievances and Discipline was issued on August 12, 1994.[62] The Board addressed the scope of representation issue from the perspective of whether such activities by an in-house counsel employed by an insurance company created an unresolvable conflict of interest under the Model[63] Code of Professional Responsibility.[64] The three provisions from the Code upon which the Board based its decision were DR 5-101, DR 5-105, and Canon 9.[65] With regards to the first part of the question presented, the Board did not find that these three rules prohibited an in-house counsel from pursuing subrogation claims against tortfeasors on behalf of the insurer.[66] The Board's reasoning was that through

---

[62] Ohio Discipline Op. 94-9. Up until this point, the scope of representation by an insurance company's in-house counsel had not been determined by ethics committees or by court decision in Ohio. Generally, it had been the custom in Ohio for insurance companies to retain outside counsel to represent insureds in litigation. *See id.* at 2.

[63] The Model Code of Professional Responsibility was adopted as the Ohio Code of Professional Responsibility on October 5, 1970. *See* OHIO CLE INST., REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM CPR 1 (1990).

[64] *See* Ohio Discipline Op. 94-9. The Board chose not to look at this issue from the perspective of whether these activities would constitute the unauthorized practice of law by a corporation because the Board felt that it was a decision for the judiciary under Gov. Bar R. VII § 8(B). *See id.* at 3. The Board did note, however, that it was a well-established principle in Ohio that corporations may not practice law. *See id.* (citing Palmer v. Westmeyer, 48 Ohio App. 3d 296 (1988) and stating that a corporate officer, who is not an attorney, may not maintain pro se litigation on behalf of the corporation); Ohio Rev. Code Ann. § 4705.01 (Baldwin 1991). (It should be noted, however, that a group of licensed attorneys in Ohio may form a corporation which exclusively practices law. *See* Gov. Bar R. III § 1.) Although the principle that a corporation may not practice law is well-established, there is at least one lower court in Ohio which has held that it does not apply to an in-house counsel employed by an insurance company. *See* Strother v. Ohio Cas. Ins. Co., 14 Ohio Op. 139, 142 (1939) (holding that an insurance company which under its policy contracts to defend in the name of, and in behalf of the insured, any and all lawsuits brought against the insured within the terms of the policy, has a direct pecuniary interest in the outcome of the law suit, and does not engage in the illegal or unauthorized practice of law by employing its own attorneys to take charge of and direct such litigation or to adjust claims against the insured); *see also infra* note 101.

[65] *See* Ohio Discipline Op. 94-9, at 3.

[66] *See id.* Subrogation is an equitable remedy that seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity, should bear it. *See* Gregory R. Veal, *Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited*, 28 TORT & INS. L.J. 69, 69 (1992). The transfer of responsibility is accomplished

the principles of subrogation, the insurer had actually stepped into the shoes of the insured in pursuing the claim against the tortfeasor, and therefore, the in-house attorney was representing the insurer and not the insured.[67] Consequently, because the in-house counsel was actually representing the insurer in the subrogation claim, no conflict of interest problems arose with the Model Code of Professional Responsibility.[68]

The Board came out differently, however, with regards to whether it was proper for salaried attorneys employed by an insurance company to attempt collection of deductibles from the tortfeasor on behalf of insureds. The Board stated that the Model Code of Professional Responsibility prohibited an in-house attorney employed by an insurance company from representing an insured in seeking collection of the insured's deductible.[69] Under Canon 9, the Board stated that such a representation created an appearance of impropriety because it was possible that the attorney (employee) would place the welfare of the insurance company (employer) above the best interests of the insured.[70] Further, the Board stated that under DR 5-101 and DR 5-105, potential and actual conflicts of interest existed for the in-house counsel.[71] The Board listed these conflicts of interest as including disputes surrounding coverage, policy limits, liability, negligence, and settlement issues.[72] In the Board's opinion, the in-house attorney could not adequately represent the interests of the insured and the insurer, even with full disclosure and consent, and therefore, such a representation was prohibited by the Model Code of Professional Responsibility.[73]

---

by the fiction that the paying party (subrogee) steps into the shoes of the person who suffered the loss (subrogor) for the purpose of enforcing the subrogor's rights against the ultimately responsible party. *See id.* at 70. Subrogation may arise from contract or by operation of law. *See id.* In Ohio, subrogation is considered a derivative right of the insurer, which is recognized by contract, statute, and case law. *See, e.g.*, Ohio Rev. Code Ann. § 3937.18(E) (Baldwin 1991); McDonald v. Republic-Franklin Ins. Co., 45 Ohio St. 3d 27, 29 (1989). Overall, insurers rely on subrogation for reimbursement. *See* Veal, *supra*, at 70.

[67] *See* Ohio Discipline Op. 94-9, at 2.

[68] *See id.* at 5.

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See id.* The Board suggested that outside independent counsel should be retained by the insured, thereby eliminating the employer-employee relationship between the attorney and the insurance company. *See id.*

2. *Opinion 95-14*

The second opinion rendered by the Board of Commissioners on Grievances and Discipline was issued on December 1, 1995.[74] This opinion affirmed the first part of Op. 94-9, stating that an in-house attorney employed by an insurance company may pursue subrogation claims against a tortfeasor on behalf of the insurer because such a representation did not conflict with the Model Code of Professional Responsibility.[75] However, with regard to the second part of Op. 94-9, the Board completely reversed itself in Op. 95-14.[76] The Board stated that an in-house attorney employed by an insurance company may represent the insured in the collection of her deductible with the consent of the insured.[77] In order for such a representation to comply with DR 5-101, DR 5-105, and Canon 9 of the Model Code of Professional Responsibility, the in-house attorney "must exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interests, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable."[78]

The Board went on to state three important reasons why full disclosure and consent were necessary in the representation of the insured by an in-house

---

[74] Ohio Discipline Op. 95-14.

[75] *See id.* at 3. Once again, the Board stated that the insurer has a derivative right to stand in the place of the insured and sue any party whom the insured could have sued. *See id.* at 4.

[76] *See id.* at 6. The Board in this opinion stated that it withdrew Op. 94-9, issued on August 12, 1994. *See id.*

[77] *See id.* The Board acknowledged that under Ohio Department of Insurance Rule 3901-1-54(H)(10) an insurer must include the insured's deductible in its subrogation demands. The rule states:

> An insurer shall include the first party claimant's deductible, if any, in subrogation demands. The insurer shall share any subrogation recovery received on a proportionate basis with the first party claimant, unless the first party claimant's deductible has been paid in advance or recovered. The insurer shall not deduct expenses from this amount except that an outside attorney or collection agency retained to collect such recovery may be paid a pro rata share of his expenses for collecting this amount.

Id. at 4. It is difficult to determine whether the Board's acknowledgment of this rule is what led to the reversal of the prior opinion (Op. 94-9) or whether the Board's different interpretation of the specific provisions of the Model Code of Professional Responsibility actually led to the reversal. As it was not stated specifically by the Board, this dilemma just adds to the complexity of the issue.

[78] *See id.* at 6.

attorney employed by an insurance company. First, under DR 5-101(A), full disclosure of the employment relationship and consent by the insured help alleviate concerns that the attorney's interests will unknowingly supersede the insured's interests.[79] Second, under Canon 9, full disclosure of the employment relationship and consent by the insured protect against any appearance of impropriety that would exist if the insured was not aware of the employment relationship between the in-house attorney and the insurer.[80] Third, under DR 5-105, potentially conflicting interests exist between the insurer and the insured which could affect the lawyer's independent professional judgment.[81] Thus, DR 5-105(C) requires consent after full disclosure.[82]

As stated, this second opinion rendered by the Board of Commissioners on Grievances and Discipline reversed Op. 94-9 on the issue of whether an in-house attorney employed by an insurance company could also represent the insured in the collection of the deductible.[83] With these inconsistent opinions, it is necessary to determine which opinion made the proper interpretation of the Model Code of Professional Responsibility so that attorneys working in the area of insurance defense will have some guidance on how to approach the issue. This determination can only be made by first looking at other authorities across the nation.

B. *Opinions Rendered by Other Authorities*

The following opinions are a reflection of various decisions which have been rendered on the proper scope of representation for an in-house counsel employed by an insurance company. The opinions are grouped according to whether they hold that an in-house counsel employed by an insurance company may represent[84] or may not represent[85] an insured.

---

[79] *See id.* at 5.

[80] *See id.*

[81] *See id.* Ethical consideration 5-17 acknowledges this potential conflict. It states that "[t]ypically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, *an insured and his insurer*, and beneficiaries of the estate of the decedent." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1980) (emphasis added).

[82] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980).

[83] *See* Ohio Discipline Op. 95-14, at 6.

[84] *See id.*

[85] *See* Ohio Discipline Op. 94-9.

1. *In-House Counsel May Represent the Insured*

The most recent opinion stating that an in-house counsel employed by an insurance company may represent an insured was issued by the Supreme Court of Tennessee in 1995.[86] In this decision the court vacated an earlier opinion rendered by the Tennessee Board of Professional Responsibility. The Board's opinion stated that it was "improper for in-house attorney employees of an insurance company to represent individual insureds in legal matters arising under that company's policy."[87] The court held that the Board's decision had to be vacated because the Board had improperly interpreted the Model Code of Professional Responsibility.[88]

The court stated that the Code prohibited any relationship between the in-house attorney, the insurer, and the insured which would create a real and actual conflict of interest and impair the attorney's loyalty to either the insurer or the insured.[89] The relationship of the employer (insurer) and the employee (attorney) obviously created the potential for conflicts of interest, but not necessarily real and actual conflicts of interest.[90] Because the Board made its decision based on the potential for conflicts of interest which could arise in the relationship between the insurer and the in-house attorney, as opposed to basing its decision on any real conflicts of interest that were supported by fact, the Board erred in its interpretation of the Code.[91] Consequently, the court held that it was proper for an in-house attorney employed by an insurance company to represent an insured as long as no real and actual conflicts of interest existed which would violate the Code.[92]

Other authorities also have supported the proposition that an in-house attorney employed by an insurance company may represent an insured. The Virginia State Bar stated "that it is not improper for an attorney who is an employee of an insurance carrier to represent a client who is insured by his

---

[86] *In re* Youngblood, 895 S.W.2d 322 (Tenn. 1995).

[87] *See id.* at 327.

[88] *See id.* at 330.

[89] *See id.* at 328.

[90] *See id.*

[91] *See id.* at 330. The court based part of its reasoning on a prior Tennessee case which stated that "unless and until such an adjudication is made upon an adequate factual record, each appointment should be examined and a determination made concerning whether any actual or perceived conflict of interest exists that would prejudice the defense of the case under consideration." State v. Jones, 726 S.W.2d 515, 520 (Tenn. 1987).

[92] *See Youngblood*, 895 S.W.2d at 330. It seems that a mere potential for a conflict of interest was not enough to violate the Code. A real and actual conflict must exist before such a representation by an attorney could be considered a violation.

employer."[93] The ABA Standing Committee on Ethics and Professional Responsibility held that an in-house attorney employed by an insurance company may represent the insurer in subrogation claims and may represent the insured in the collection of the deductible.[94] Finally, the Philadelphia Bar Association rendered an opinion on this issue which stated that an in-house counsel may represent an insured if all foreseeable conflicts of interest have been resolved or no longer exist.[95]

2. *In-House Counsel May Not Represent the Insured*

A recent decision supporting the proposition that an in-house counsel employed by an insurance company may not represent the insured was rendered by the Supreme Court of North Carolina.[96] This decision affirmed a prior opinion of the North Carolina State Bar Association,[97] which stated that an in-house counsel employed by an insurance company could not represent the insured in an action brought by a third party that was based on the terms of the insurance policy[98] and that an in-house counsel could not represent an insured in subrogation claims for property damage.[99] The State Bar gave two reasons for its decision: (1) allowing in-house attorneys to represent insureds would violate the ban on the practice of law by corporations, and (2) the proposed representation would result in an increased risk for conflicts of interest which the State Bar considered to be unacceptable.[100] The court upheld the opinion of the State Bar stating that the proposed practice of allowing an in-house counsel employed by an insurance company to represent an insured would constitute

---

[93] Virginia State Bar, Op. 598 (1985).

[94] *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1370 (1976). The committee further stated that such a representation was appropriate "provided you make the prescribed disclosure and remain sensitive to any subsequent divergence of interests of your clients." *Id.*

[95] *See* Philadelphia Bar Ass'n, Op. 86-108 (1987). This opinion further stated that an in-house counsel could also represent the insurer in subrogation claims. *See id.*

[96] Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986). The state of North Carolina has taken the strongest stance supporting this proposition.

[97] *See id.* at 518–23; North Carolina State Bar Ass'n, Op. CPR 326 (1982). This opinion by the North Carolina State Bar affirmed two of its prior opinions. *See* North Carolina State Bar Ass'n, Op. 682 (1969); North Carolina State Bar Ass'n, Op. CPR 19 (1974).

[98] *See* North Carolina State Bar Ass'n, Op. CPR 326 (1982).

[99] *See id.*

[100] *See Gardner*, 341 S.E.2d at 519 (citing North Carolina State Bar Ass'n, Op. CPR 326 (1982)).

the unauthorized practice of law by a corporation.[101] Because the court upheld the State Bar's opinion based on the theory that this representation constituted the unauthorized practice of law, the court did not deem it necessary to explore whether such a representation by an in-house counsel constituted an unacceptable risk for conflicts of interest.[102]

Other authorities have also supported the proposition that an in-house counsel employed by an insurance company may not represent an insured. The North Carolina State Bar rendered an opinion in which it stated that an in-house counsel could not pursue a subrogation claim on behalf of the insurer with the insured as co-plaintiff.[103] The Kansas State Bar Association has held that an in-house counsel may not represent an insured in actions brought by third parties involving claims under the insurance policy.[104] Finally, the

---

[101] *See Gardner*, 341 S.E.2d at 523. As stated *supra* note 64, The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline did not decide on the issue of whether an in-house counsel representing an insured constituted the unauthorized practice of law by a corporation. *See* Ohio Discipline Op. 95-14, at 2. This present opinion by the Supreme Court of North Carolina held that such a representation did constitute the unauthorized practice of law by a corporation. *See Gardner*, 341 S.E.2d at 523. Other authorities, however, have taken the contrary position on this issue and have stated that such a representation by an in-house counsel did not necessarily constitute the unauthorized practice of law by a corporation. *See, e.g.*, *In re* Allstate Ins. Co., 722 S.W.2d 947, 951 (Mo. 1987) (holding that such a representation by an in-house counsel of an insured did not constitute the practice of law by a lay corporation); *In re* Youngblood, 895 S.W.2d 322, 331 (Tenn. 1995) (holding that the mere showing of the employer-employee (*i.e.*, insurer-attorney) relationship, without a definition of duties, loyalties, prerogatives, and interests of the parties, was not a sufficient foundation on which to conclude that the attorney-employee was aiding a non-attorney (insurance company) in the practice of law); California State Bar, Formal Op. 1987-91 (1988) (stating that an "[i]n-house counsel for an insurer may represent insureds in litigation without violating the prohibition against aiding the unauthorized practice of law"; the mere fact that the attorney was an employee of an insurance company did not necessarily compromise the attorney's independent professional judgment).

Although there is this split in authorities, it appears that only the states of North Carolina, Kentucky, and Kansas have held that it was unethical or improper for an in-house counsel employed by an insurance company to represent an insured. *See* William K. Edwards, *The Unauthorized Practice of Law by Corporations: North Carolina Holds the Line*, 65 N.C. L. REV. 1422, 1422 n.8 (1987). Consequently, the clear weight of authority, based on both court rulings and state bar opinions, supports the position that it is ethical for an in-house counsel employed by an insurance company to represent the insured. *See id.*

[102] *See Gardner*, 341 S.E.2d at 523.

[103] *See* North Carolina State Bar Ass'n, Op. RPR 151 (1993).

[104] *See* Kansas Bar Ass'n, LEO 83-6 (1983) (agreeing with the views expressed in the

Kentucky Bar Association has stated that a district adjuster, who is a full-time salaried employee of a Workmen's Compensation insurer and is also a licensed attorney, could not handle Workmen's Compensation cases for his employer due to the inherent conflicts of interest.[105]

C. *The Ohio Ethical Opinion Which Made the Proper Interpretation of the Code*

As stated before, it is necessary to determine which Ohio Ethics Opinion made the proper interpretation of the Model Code of Professional Responsibility so that attorneys will have guidance on how properly to proceed when confronted with this issue. Consequently, when approaching this issue from the perspective of whether multiple representation of both the insurer and the insured creates unresolvable conflicts of interest,[106] Op. 95-14[107] seems quite clearly to have been the proper interpretation of the Code by The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline. The apparent weight of authority, based on court rulings and state bar considerations, supports the proposition that it is ethical for an in-house counsel employed by an insurance company to represent the insured.[108]

Authorities, including Op. 95-14, which have supported this proposition have interpreted the Code to allow such a representation as long as no real conflicts of interest exist which would affect the attorney's loyalty or independent professional judgment in representing both the insured and the insurer.[109] Likewise, dual representation is permitted only after the attorney receives each client's fully informed consent to the joint representation.[110] The

---

North Carolina State Bar Ass'n, Op. CPR 326 (1982)).

[105] *See* Kentucky Bar Ass'n, Unauthorized Practice Op. U-2 (1962).

[106] This perspective is the point of view that the Ohio Board chose to take in resolving the issue of the proper scope of representation for an in-house counsel employed by an insurance company. *See* Ohio Discipline Op. 94-9; Ohio Discipline Op. 95-14. The Board chose not to look at this issue from the perspective of whether such activities by an in-house counsel would constitute the unauthorized practice of law by a corporation. *See id.* Although, as stated *supra* note 101, it appears that the majority of authorities have held that such activities by an in-house counsel do not constitute the unauthorized practice of law by a corporation. *See, e.g.*, *In re* Youngblood, 895 S.W.2d 322, 331 (Tenn. 1995).

[107] Ohio Discipline Op. 95-14.

[108] *See* Part IV(B); *see also supra* note 101 and accompanying text. After a thorough examination of authorities, it appears that no state, with the exceptions of North Carolina, Kentucky, and Kansas, has held such a representation to be unethical or improper. *See* Edwards, *supra* note 101, at 1422 n.8.

[109] *See, e.g.*, *Youngblood*, 895 S.W.2d at 329-30; Ohio Discipline Op. 95-14, at 5–6.

[110] *See, e.g.*, Ohio Discipline Op. 95-14, at 5; Virginia State Bar, Op. 598 (1985);

informed consent requires the attorney to fully disclose all the facts, circumstances, and potential conflicts which surround this type of representation.[111]

In addition, an examination of the actual language of the Model Code of Professional Responsibility supports the proposition that an in-house attorney employed by an insurance company may represent an insured as long as certain requirements are fulfilled. These requirements state that a lawyer may represent multiple clients as long as: (1) the lawyer can adequately represent the interests of each client, (2) the lawyer's professional judgment on behalf of each client is not adversely affected, and (3) each client consents to the representation after full disclosure of all matters involved.[112] Thus, in analyzing the relevant authorities and the actual provisions of the Code, it is evident that an in-house counsel employed by an insurance company may represent an insured.

Furthermore, the only real negative authority which has made a finding contrary to the conclusion that an in-house counsel employed by an insurance company may represent an insured was *Gardner v. North Carolina State Bar*.[113] In that case the court held that an in-house counsel employed by an insurance company could not represent an insured because such a representation constituted the unauthorized practice of law by a corporation.[114] This holding, however, does not successfully refute the conclusions stated by the Ohio Board in Op. 95-14 for two reasons.

First, the *Gardner* decision has gained very little support from jurisdictions outside the state of North Carolina.[115] As a matter of fact, the clear weight of

---

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1370 (1976).

[111] *See, e.g.*, Ohio Discipline Op. 95-14, at 5; Virginia State Bar, Op. 598 (1985); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1370 (1976).

[112] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(B), & DR 5-105(C) (1980). It is no mere coincidence that the requirements stated by the various authorities for joint representation of the insured and the insurer and the requirements stated here by the Code are nearly identical.

[113] 341 S.E.2d 517 (N.C. 1986).

[114] *See id.* at 523. As stated *supra* notes 101 and 106, this issue has divided authorities with the clear weight of authorities finding that such a representation by an in-house counsel does not constitute the unauthorized practice of law by a corporation. *See, e.g., Youngblood*, 895 S.W.2d at 331.

[115] *See* Edwards, *supra* note 101, at 1422 n.8. In fact, no other state, with the possible exceptions of Kansas and Kentucky, has held such a representation to be unethical or improper. *See id.* In addition, the *Gardner* holding has been questioned for its lack of substantive analysis of the ethical issues surrounding the use of an in-house counsel to represent an insured and for its failure to address the arbitrary distinction between local and in-house counsel in the disputed North Carolina statute (CPR 326) which addresses this joint representation issue. *See id.* at 1440.

authorities in other states have held that it is ethical for an in-house counsel employed by an insurance company to represent the insured.[116] Second, the North Carolina Supreme Court did not decide the issue from the perspective of whether such a practice constituted an unacceptable risk for conflicts of interest; the court only approached the issue from the perspective of whether such a representation constituted the unauthorized practice of law.[117] Therefore, as the Ohio Board, in Op. 95-14, addressed the issue from only the conflict of interest perspective,[118] the North Carolina decision made no finding that was contrary to the Ohio Board's conclusions which were based on the conflict of interest perspective.[119]

Consequently, attorneys can look to this Ohio opinion to find guidance on the proper scope of representation for an in-house counsel employed by an insurance company.[120] The guidance is that an in-house counsel employed by an insurance company may represent an insured as long as the attorney (1) can adequately represent the interests of each client, (2) exercises independent professional judgment on behalf of each client, (3) discloses the employment relationship as well as any differing interests to each client, and (4) receives consent from each client as to the multiple representation.[121]

V. THE PROPOSED NEW MODEL STATUTE

Although the Ohio Board's Op. 95-14[122] provides some guidance on the issue of the proper scope of representation for an in-house counsel employed by an insurance company, a split in authority still remains on the issue creating a lack of uniformity across all jurisdictions. This lack of uniformity, in turn, affects attorneys who are looking for proper guidance on this matter.

Consequently, the solution to this problem is to add a new Ethical Consideration[123] to the Model Code of Professional Responsibility which

---

[116] *See id.* at 1422 n.8; *see also* Part IV(B); *supra* note 101 and accompanying text.

[117] *See* Gardner v. North Carolina State Bar, 341 S.E.2d 517, 523 (N.C. 1986).

[118] Ohio Discipline Op. 95-14, at 2.

[119] *See id.*

[120] An attorney can look to the Ohio Board's opinion for guidance, but she must remember that the Ohio Board's opinion is not a binding authority in the state of Ohio. *See id.* at 8.

[121] *See id.* at 6.

[122] *Id.*

[123] The Disciplinary Rules do a good job of addressing the conflict of interest issues in a general manner. Thus, it is not necessary to insert a new Disciplinary Rule that specifically addresses the proper scope of representation for an in-house counsel employed by an insurance company. However, because the Disciplinary Rules are general in nature, it

would state clearly the Code's position on this issue. This solution not only takes care of the lack of uniformity problem, it also effectively works to give attorneys clear guidance on the proper scope of representation for an in-house counsel employed by an insurance company. The proposed new Ethical Consideration states:

> EC-25[124] A lawyer employed by an insurance company may represent an insured in a claim seeking collection of the insured's deductible or in an action brought by a third party involving terms of the insurance policy as long as (A) the lawyer can represent adequately the interests of both the insured and the insurer, (B) the lawyer's professional judgment on behalf of both the insured and the insurer is not adversely affected, and (C) both the insured and the insurer consent to the multiple representation after full disclosure of all the potential differing interests.

This proposed new Ethical Consideration fits neatly into the language of the Model Code of Professional Responsibility which states the requirements for multiple client representation under DR 5-105.[125] EC-25 actually proposes to insert additional language regarding the representation of the insured and insurer into the already existing language of DR 5-105.[126] Thus, EC-25 provides further guidance to attorneys by stating specifically that the multiple representation provisions under DR 5-105 may be applied to an in-house counsel representing both the insured and the insurer.

The language of EC-25 is supported by the various authorities discussed in Part IV. Specifically, the Ohio Board's Op. 95-14 stated that an in-house counsel employed by an insurance company may represent the insured as long as the attorney has received informed consent from each client after full

---

is necessary to insert a new Ethical Consideration which can provide specific guidance to attorneys on this issue. Although technically not binding, the Ethical Considerations are usually reserved for specific guidance on a particular area. Consequently, a new Ethical Consideration has been proposed here to provide specific guidance on the proper scope of representation for an in-house counsel employed by an insurance company.

[124] The proposed new Ethical Consideration should be placed under the subheading "*Interests of Multiple Clients*" found after EC 5-13 under Canon 5 of the Model Code of Professional Responsibility. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980).

[125] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

[126] For example, DR 5-105(B) states that "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1980). EC-25(B) states that a lawyer employed by an insurance company may represent an insured in a claim as long as the lawyer's professional judgment on behalf of both the insured and the insurer is not adversely affected.

disclosure of all the potential conflicts.[127] Therefore, this newly proposed EC-25 is in accordance with the Model Code of Professional Responsibility and the authorities which have interpreted its provisions.

VI. CONCLUSION

Insurance defense representation can prove to be a very difficult task. The area is wrought with potential conflict of interest problems which evoke consideration of the Model Code of Professional Responsibility. The latest dilemma to emerge for insurance defense attorneys is the proper scope of representation for an in-house counsel employed by an insurance company. Although there is still some split in authority, the Ohio Board's Op. 95-14 states what is considered to be the majority view on this issue: an in-house attorney employed by an insurance company may represent an insured.[128]

Ethical Consideration 25 (EC-25), as proposed above, would clarify the issue by setting forth the exact guidelines that an in-house attorney employed by an insurance company should follow in representing both the insured and the insurer. Consequently, even though the proper scope of representation for an in-house counsel still remains in dispute, the in-house counsel can rest assured that there is some quality guidance to be found regarding his ethical responsibilities in handling this issue.

---

[127] *See* Ohio Discipline Op. 95-14, at 6; *see also In re* Youngblood, 895 S.W.2d 322, 330 (Tenn. 1995).

[128] *See* Ohio Discipline Op. 95-14, at 6.